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No. 204.

Brf. of Leovy, Blair & Morse
Appellees

Filed Jan. 13, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

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THE PLAQUEMINES TROPICAL FRUIT COMPANY,
APPELLANT,

versus

WM. HENDERSON AND HENRY J. LEOVY, APPELLEES.

BRIEF FOR APPELLEES.

HENRY J. LEOVY,
JOSEPH PAXTON BLAIR,
Alexander Porter Morse *Counsel for Appellees.*

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STATEMENT OF THE CASE.

Plaintiff, claiming to be the owner and in possession of certain land in this State, and charging defendants with asserting title thereto, and interfering with its ownership and possession, brings this suit to enjoin defendants from trespassing or committing waste on the land to which they assert title, and to obtain a decree recognizing the validity of plaintiff's title and quieting it in the possession thereof.

Defendants plead in bar a former adjudication of the State Court, in a suit brought by the State against complainant and Charles C. Buck, its then President, in which it was adjudged that the State was the owner and entitled to the possession of the land which complainant now claims, and in which complainant was perpetually enjoined from interfering with the State's full rights of ownership

and possession of the land. The plea contains the usual and proper averments, showing the validity of the proceedings in the State Court and the finality of the judgment pleaded in bar. It is further averred that the title under which complainant now claims the land is the same title which it set up and relied upon in the State Court; and that the land stated in complainant's bill of complaint to have been acquired by defendants from the State of Louisiana, and of which complainant now claims to be the owner, and in respect to which the relief herein sought is asked, based on said claim of ownership, is a part and portion of the same land which was adjudged by the State Court to belong to the State, and that the defendants acquired the land from the State subsequent to the judgment of the State Court, and are privies in estate to the State, in whose favor the judgment was rendered.

It is manifest that the complainant has no right to seek the relief it prays for unless it is the owner and entitled to the possession of the land which it charges defendant with asserting title to. It is equally manifest that, in claiming to be the owner and possessor of the land in question, complainant is asserting the contrary of what was adjudged in the State Court, and is violating the injunction issued by that Court.

Unless the former adjudication pleaded in bar is an absolute nullity, defendants' plea must be adjudged sufficient.

Complainant contends that all the proceedings in the State Court, including the final decree and injunction, are absolute nullities, because the State Court was without jurisdiction. The want of jurisdiction is based on the proposition, that, by reason of the Constitution and laws of

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the United States as they exist at present, a State Court has no jurisdiction of a suit between a State and the citizens of another State; that the Supreme Court of the United States has exclusive jurisdiction of such controversies.

For more than a century every State Court in every State of the Union has been constantly entertaining jurisdiction over such cases, and it is now claimed, at this late day, that the innumerable judgments which have been rendered by State Courts in such causes are absolute nullities. It is claimed that every suit by a State against a citizen of another State, or an alien, every controversy over the collection of a tax or other petty matter, must be instituted in the Supreme Court of the United States. On the strength of this discovery, your Honors will be asked to pronounce against the construction of the Constitution made in the discussions in the Federalist, which preceded its adoption against the construction placed upon it by the Judiciary Act of 1789, by men who played an important part in drafting the Constitution itself, against the construction placed upon it by successive Congresses from the Judiciary Act of 1789, to the Revised Statutes of 1875, a construction which has been recognized and acted upon by all the Courts of this country, State and Federal, and has been acquiesced in by the bar and by litigants for over one hundred years.

Turning first to the Revised Statutes, we find that Section 687 provides that, "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, *except* between a State and its citizens, *or between a State and citizens of other States, or aliens,*

in which latter case it shall have original, but not exclusive jurisdiction. * * *" (Italics ours).

And Section 711, enumerating the cases where the jurisdiction of the Courts of the United States shall be exclusive of the Courts of the several States, in the seventh paragraph expressly excepts cases "between a State and citizens of other States."

So far as the Statutes go, they expressly recognize the concurrent jurisdiction of the State Courts in the class of cases under discussion. If we go back to the Judiciary Act of 1789, passed by men who were conversant with the discussions which attended the adoption of the Constitution, many of whom took part in framing the Constitution, we find that they also were unaware of the exclusive nature of the Constitutional grant of jurisdiction to the Federal Courts. Section 13 of the Act of 1789 provided "that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original, *but not exclusive* jurisdiction." (Italics ours).

Neither the Act of 1789 nor the Revised Statutes gave jurisdiction to the Circuit or District Courts of the United States over controversies between a State and citizens of other States, unless where their jurisdiction attached by reason of the nature or the case, irrespective of the parties. Hence, in providing that the original jurisdiction of the Supreme Court over such cases should not be exclusive, Congress must have had in mind the jurisdiction of the State Courts, and the express exception of such cases is tan-

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tamount to a declaration of the intention not to interfere with the concurrent jurisdiction of the State Courts.

Unless the Court is prepared to hold that the framers of the Act of 1789 and subsequent Congresses have misunderstood and disregarded the Constitution, we need go no farther. But complainant does not hesitate to attack the constitutionality of the Act of 1789, and to assert the nullity of the cited Sections of the Revised Statutes. He appeals from them to the Constitution.

We turn, then, to the Constitution. As the question is, whether a power given to the general government is exclusive, or whether the States may maintain a concurrent exercise, it is well to state the established canon of constitutional interpretation in regard to exclusive and concurrent powers. It was first laid down in the Federalist, from which Judge Story quotes in his work on the Constitution, as follows (Section 436): "But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignity which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather the alienation of State sovereignity, would only exist in three cases, where the Constitution in express terms granted an exclusive authority to the Union; where it granted, in one instance, an authority to the Union, and in another prohibited the States from exercising the like authority, and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." Commenting on this last rule, the author says (Sec. 438): "But unless, from the nature of the power or from the obvious

results of its operations, a repugnancy must exist, so as to lead to a necessary conclusion that the power was intended to be exclusive, the true rule of interpretation is, that the power is merely concurrent."

The Constitution of the United States provides as follows (Article III, Sec. 2, Cl. 1 and 2) :

"Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; to all cases affecting Ambassadors, other public Ministers and Consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies between two or more States ; between a State and citizens of another State ; between citizens of different States ; between citizens of the same State claiming land under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

"In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Now, the constitutional grant of judicial power to the general government contains no words of exclusion, nor are the State Courts elsewhere prohibited from exercising jurisdiction over the cases mentioned in Article III. Hence, unless the grant of jurisdiction to the Federal Courts over certain cases is "absolutely and totally repugnant" to the existence of concurrent jurisdiction in the State Courts over the specified cases, there is nothing in the Constitution to oust the State Courts of concurrent jurisdiction

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over controversies between a State and citizens of other States.

Complainant's contention is that the mere grant, in the first clause of Section 2, to the Federal Courts of jurisdiction over certain classes of cases, including controversies between a State and citizens of other States, coupled with the grant to the Supreme Court of original jurisdiction in cases in which a State shall be a party, is sufficient of itself to completely oust the State Courts of any jurisdiction over such cases, and makes it imperative that all such cases must be tried in the Supreme Court of the United States. He seems to admit that Congress might provide for their trial in other Courts, provided the right to *remove* directly to the Supreme Court were conferred in every case, but as Congress has not done this, he contends that all controversies between a State and citizens of other States, or aliens, must be brought in the United States Supreme Court.

The fallacy of complainant's contention consists in the assumption that there is something in the nature of a grant of jurisdiction or judicial power, or in the grant of jurisdiction over the particular class of cases in question, which renders it exclusive or inconsistent with the existence of concurrent jurisdiction in the State Courts. The contrary is the well established law.

In discussing the identical question now presented, the Court of Errors of New York said, in an exceedingly elaborate opinion :

"There is nothing in the nature of jurisdiction, as applied to Courts, which renders it exclusive. It is not like a grant of property, which cannot have several owners at the same time. It is matter of common experience that two or more Courts may have concurrent powers over the

same parties and the same subject matter. Jurisdiction is not a right or a privilege belonging to a Judge; but an authority or power to do justice in a given case when it is brought before him. There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular Court, without any words of exclusion, has been held to oust any other Court of the power which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the Courts which before existed a portion of the causes which would otherwise have been brought before them; but it cannot affect the power of the old Courts to administer justice when it is demanded at their hands." Delafield vs. State of Illinois, 11 Hill's Reports (New York Court of Errors), pp. 164-5.

This case was referred to by Chancellor Kent in his Commentaries, when, after discussing the concurrent powers of the States in matters of judicial cognizance, he said:

"The conclusion then, is that in judicial matters the concurrent jurisdiction of the State tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal Courts; and *that without an express provision to the contrary, the State Courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally* over the subject-matter." Kent's Com., Vol. 1, p. 400.

In Gittings vs. Crawford, Taney's Dec. 1, Judge Taney said, in reference to the grant of judicial power in Article III of the Constitution: "The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation in which the grant of jurisdiction over a certain subject-matter to one Court does not, of itself, imply that that jurisdiction is to be exclusive." These

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words were quoted with approval by the Supreme Court of the United States in Ames vs. Kansas, 111 U. S. p. 449, and in Bors vs. Preston, 111 U. S. p. 260.

Referring to the rules of interpretation of the Constitution cited above, Hamilton, in the 82d number of the Federalist, plainly lays down the doctrine, that the State Courts would retain concurrent jurisdiction in those cases of which they previously had cognizance. He rejects the opposite construction, because it "would amount to an alienation of the State powers by implication."

It follows, from the foregoing, that there is nothing in the grant of jurisdiction to the Federal Courts, or of original jurisdiction to the Supreme Court, over cases between a State and citizens of another State, to prevent the exercise of concurrent jurisdiction by the State Courts. Nor is there anything in the nature of such cases to prevent their trial in the Courts of a State. The Courts of every country entertain jurisdiction of controversies between the State or government, and citizens of other States, or aliens, and so did the States of the Union before the adoption of the Constitution. They have continued to do so to this day.

We submit that, upon principle, treated as *res nova*, plaintiff's contention is utterly untenable. But if there remains any doubt upon the question, it will be removed by a consideration of the authorities.

In the case of Ames vs. Kansas, 111 U. S. 449, this Court took occasion to explain the purpose and effect of the constitutional grant of original jurisdiction to the Supreme Court of certain cases, including those to which a State was a party. That suit was originally brought by the State of Kansas in its own Courts against Ames and others,

all citizens of other States (p. 457), and directors of a certain railroad company also sued, but in a separate suit. The case was removed to the Circuit Court of the United States as one arising under the Constitution and laws of the United States, the matter complained of by the State having been authorized by Congress.

The case came before the Supreme Court on error to review an order remanding the cause for want of jurisdiction. In deciding the question of the jurisdiction of the Circuit Court, the Supreme Court had to determine whether the constitutional grant to it of original jurisdiction over suits to which a State was a party was necessarily exclusive.

After referring to Sections 1 and 2 of Article III of the Constitution and the Judiciary Act of 1789, the Court said (pp. 464-5) :

"It thus appears that the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States, and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a State was a party. The evident purpose was to open and keep open the highest Court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a State to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any Court he chose having jurisdiction of the parties and the subject-matter of his action, would be,

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in many cases, to convert what was intended as a favor into a burden.

"Acting on this construction of the Constitution, Congress took care to provide that no suit should be brought *against* an ambassador or other public minister except in the Supreme Court, but that he might sue in any Court he chose that was open to him. As to consuls, the commercial representatives of foreign governments, the jurisdiction of the Supreme Court was made concurrent with the District Courts, and suits of a civil nature could be brought against them in either tribunal. With respect to States it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a State was a party, except between a State and its citizens, and *except*, also, between a State and citizens of other States, or aliens, in which latter case its jurisdiction should be original, but not exclusive. Thus, the original jurisdiction of the Supreme Court was made concurrent with any other Court to which jurisdiction might be given in suits between a State and citizens of other States, or aliens. No jurisdiction was given in such cases to any other Court of the United States and the practical effect of the enactment was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a State begun without its consent, and *to allow the State to sue for itself in any tribunal that could entertain its case.* In this way States, ambassadors and public ministers were protected from the compulsory process of any Court other than one suited to their high positions, *but were left free to seek redress for their own grievances in any Court that has the requisite jurisdiction. No limits were set on their powers of choice in this particular.* This, of course, did not prevent a State from allowing itself to be sued in its own courts or elsewhere in any way, or to any extent, it chose." (Italics ours).

No comment is necessary to show how completely plaintiff has misunderstood the purpose and meaning of the provisions of the Constitution upon which he relies.

If additional authority is wanted, we refer to the case of

California vs. Southern Pacific Company, 15 Sup. Ct. Rep. 591, decided in March, 1895.

That case was a controversy between a State and a citizen of another State, brought originally in the Supreme Court, and dismissed, because it was found that other parties, citizens of California, would be affected by the decision. The Court considered it would be *infra dignatatem* to render a judgment which would not bind every one concerned. The whole decision shows that the Court considered that the State Courts could exercise jurisdiction. Mr. Justice Field, in his concurring opinion, advised resort to the State Court, and Mr. Justice Harlem, in his dissenting opinion (p. 607), referred to the possible difficulty the State would experience in *getting service* in her courts upon a citizen of another State, and protested against *compelling* the State of California to resort to the State Courts of Kentucky.

Mr. Justice Harlan notices, also, the fact that the State must sue either in the Supreme Court of the United States, or in the State Courts, for the subordinate Federal Courts have not been given jurisdiction of suits between a State and citizens of another State, except when the suit happens to be one arising under the Constitution or laws of the United States (p. 607). And the Chief Justice, who delivered the opinion of the majority, referred to the Judiciary Act of 1789, and said that the Supreme Court had original, *but not exclusive* jurisdiction of controversies between a State and citizens of another State (p. 305). See also 5 Wheat. pp. 26-27.

If the authorities we have cited did not exist, there is a line of decisions in the Federal Courts in relation to the nature and extent of the constitutional grant of jurisdic-

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tion, in all cases affecting *consuls*, which would be equally fatal to the plaintiff's contention.

The first clause of Section 2, Article II, of the Constitution, provides that "the judicial power shall extend * * * to all cases affecting ambassadors, other public ministers and *consuls;*" the second clause of Section 2 declares that "in *all* cases affecting ambassadors, other public ministers and consuls, * * * the Supreme Court shall have original jurisdiction." Now, if any grant of jurisdiction in Article III is exclusive, it is that giving jurisdiction to *all* cases affecting ambassadors, other public ministers and consuls. There is more force in the contention that in such cases the jurisdiction is exclusive than in controversies between a State and citizens of another State, because the word "all" was omitted in dealing with the latter class of cases. Yet the Courts have refused to hold that the jurisdiction of the Supreme Court was exclusive, and have found nothing objectionable in the Acts of Congress which first gave the District Courts concurrent jurisdiction, but excluded the State Courts and finally restored the jurisdiction of the State Courts.

It is significant that the restoration of the jurisdiction of the State Courts was accomplished simply by the repeal of the clause declaring the jurisdiction to be exclusive of the State Courts. 18 Stat. at Large, p. 318; and see Houston vs. Moore, 5 Wheat. 1, 27; see also 1 Kent's Comm. p. 399.

The legislation and jurisprudence on the subject are fully discussed in the case of *Bors vs. Preston*, 111 U. S. 252. In that case and in those of Giddings vs. Crawford, 1 Taney, 1 and of *Graham vs. Stucken*, 4 Blatchford, 480, the

construction of the Constitution upon which plaintiff relies was rejected as unsound in principle and unsupported by authority. Some general expressions found in the earlier cases, which plaintiff cites in support of his views, are referred to in Bors vs. Preston, and shown by later utterances of the same Judges not to have the meaning or effect claimed for them.

In rejecting the proposition, that all cases affecting consuls must be brought before the Supreme Court, the inconvenience of such a construction of the Constitution was referred to, and it was said that the time of the Supreme Court, created for the decision of grave and important matters, was never intended to be taken up with the trial of petty cases. The same objection may, with greater force be urged in the present case.

It would not be difficult to make a *reductio ad absurdum* of plaintiff's contention in respect to the effect of the constitutional grant of jurisdiction over controversies between a State and citizens of another State by applying it to the other classes of cases over which the federal judiciary is in like manner granted jurisdiction. But we have already occupied far more time than the questions involved justify.

We submit that the attack upon the jurisdiction of the State Court which rendered the decision pleaded in bar is absolutely without merit, and that defendant's plea should be adjudged sufficient.

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